

STATES OF MINNESOTA, IOWA AND SOUTH DAKOTA
BEFORE THE ATTORNEYS GENERAL

In the Matter of
First PREMIER Bank

**ASSURANCE OF VOLUNTARY COMPLIANCE/
ASSURANCE OF DISCONTINUANCE**

INTRODUCTION

1. This Assurance of Voluntary Compliance or Assurance of Discontinuance (“Assurance”) is entered into by and between the Attorneys General for the States of Minnesota, Iowa and South Dakota (“Attorneys General” or “States”) and First PREMIER Bank (“First PREMIER”).

2. Mike Hatch, the Attorney General of the State of Minnesota (“Minnesota”), is authorized under Minn. Stat. chapter 8, including Minn. Stat. §§ 8.01, 8.31, 8.32 and under Minn. Stat. §§ 325F.67, and 325F.70 and has common law authority, including *parens patriae* authority, to enforce Minnesota law, including Minn. Stat. § 325F.69, subd. 1 and 325D.44, subd. 1 (2002). This Assurance of Discontinuance (“Assurance”) is entered into under Minn. Stat. § 8.31, subdivision 2b (2002).

3. Thomas J. Miller, the Attorney General of the State of Iowa (“Iowa”), is authorized under Iowa Code § 714.16 (4) - (7) (2003) to enforce the Iowa Consumer Fraud Act, Iowa Code § 714.16 (2003). This Assurance of Voluntary Compliance (“Assurance”) is entered into in resolution of a dispute arising under that Act.

4. Lawrence E. Long, the Attorney General of the State of South Dakota (“South Dakota”), is authorized under SDCL chs. 37-23 and 37-24 to enforce the South Dakota

Deceptive Trade Practices and Consumer Protection Act, SDCL ch. 37-24. This Assurance of Voluntary Compliance (“Assurance”) is entered into in resolution of a dispute arising under that Act.

5. First PREMIER is a bank organized and existing pursuant to the laws of South Dakota, with its principal place of business at 601 South Minnesota Avenue in Sioux Falls, South Dakota 57104-4824.

6. First PREMIER’s state and federal banking regulators are the South Dakota Division of Banking and the Federal Reserve Bank of Minneapolis.

ALLEGATIONS

7. The Attorneys General make the following allegations:

A. Since 2001, First PREMIER has processed ACH transactions on behalf of eTelecom, Inc. d/b/a Global eTelecom, Inc. (“GETI”) for its telemarketing customers. GETI’s telemarketing customers have included the following:

1. Rockwell Holdings, Inc. doing business under the name Rockwell Holdings Benefit Club;
2. Proto Call Centers, LLC or Port of Call Centers, LLC and Frederick J. Dick, Jr., doing business under the names Bargain Advantage Society, Credit Enhancement Services, Liberty Benefits, and/or Titanium Blue among others;
3. Assail, Inc.; Summit Communications, Inc.; Capital First Benefits, Inc.; and/or Premier One Benefits, Inc., doing business under the

names Advantage Capital, Capital First Benefits, and/or Premier One, among others; and

4. Other customers incorporated or doing business as American Benefits Club and Credit Card Services; Capital Choice Consumer Credit, Inc./d/b/a National Credit Shopper and NCS; E-Credit Solutions, Inc.; Ecommex Corporation f/k/a Millenium Express Group, Inc.; and Millenium Communications and Fulfillment, Inc. d/b/a National Research Group.
- B. Since 2002, First PREMIER has likewise processed ACH transactions on behalf of ACH Commerce for its telemarketing customers. ACH Commerce's telemarketing customers have included Suntasia, doing business under the names Capital Vacations, In Touch LD, Travel Agent Network, Free Stuff For You, and Capital Fee.
- C. The telemarketing customers of GETI and ACH Commerce used fraudulent and deceptive Telemarketing to market goods, services or merchandise to residents of Minnesota, Iowa and South Dakota ("consumers"), including bogus advance-fee credit card packages and "upsells" such as telephone calling plans (e.g., ePhone Telecom, Premium Mega Saver, Mega Minute Saver) and various risk-management plans (e.g., Household Protection and Hartford Auto Club).
- D. The telemarketing customers of GETI and ACH Commerce originated ACH debits to the bank accounts of consumers in order to obtain payment for the

merchandise without compliance with NACHA Rules, including but not limited to representing and warranting that consumers had authorized ACH debits when, in fact, they had not, and engaging in cold calling, that is, telemarketing to persons with whom there is no existing relationship.

- E. As third-party service providers, GETI and ACH Commerce served as surrogates for their telemarketing customers to First PREMIER Bank, under which relationship GETI and ACH Commerce acted as sending points for unauthorized transactions originated by their telemarketing customers in the ACH Network.
- F. First PREMIER processed ACH transactions serviced and originated by GETI, ACH Commerce and its telemarketing customers under circumstances in which it knew or should have known the transactions were unauthorized or fraudulently induced, based on its knowledge of deceptive marketing materials, consumer complaints, and excessive return rates of the telemarketing customers of GETI and ACH Commerce. Numerous consumers nationwide incurred financial losses through such ACH transactions in connection with which they have not received refunds.
- G. Notwithstanding such knowledge, First PREMIER represented to ACH Operators and to consumers' banks that consumers had authorized the ACH debit transactions when, in fact, they had not, and otherwise facilitated the fraud perpetrated upon consumers by the telemarketers.

- H. First PREMIER's conduct in this regard violates state consumer protection statutes prohibiting fraudulent, deceptive or unfair practices in business, commerce or trade, including Minn. Stat. §§ 325F.69, subd. 1 and 325D.44, subd. 1 (2004); Iowa Code § 714.16 (2003); and SDCL ch. 37-24.
8. First PREMIER makes the following allegations:
- A. First PREMIER's conduct has not violated state consumer protection statutes, the NACHA Rules, or any other law, regulation or rule, and any fraudulent, deceptive, or unfair practices in business, commerce or trade were committed by the telemarketers originating the ACH entries through GETI and ACH Commerce.
 - B. First PREMIER took steps to terminate the ability of the telemarketers to originate ACH transactions and placed a hold on the funds of the third-party service providers, GETI and ACH Commerce, to ensure that all consumers claiming a right to a refund in connection with the ACH transactions received full refunds of the sums withdrawn from their accounts.
 - C. Prior to the investigation by the Attorneys General, First PREMIER was unaware of any consumers who did not receive a refund in connection with allegedly unauthorized ACH transactions originated through either GETI or ACH Commerce.
 - D. First PREMIER further disputes the Attorneys General's claim that the bank processed "unauthorized" ACH transactions. First PREMIER's investigation of the facts and circumstances surrounding the referenced originations

revealed that the ACH transactions were generally authorized by the consumer in that the consumer had provided his or her bank account information and authorized the debit in the stated amount. The consumers' primary complaints arose when the telemarketer failed to deliver the product or service purchased or the product or service was not as represented to the consumer. First PREMIER affirmatively states that consumer complaints regarding a product, or the delivery thereof, are not "unauthorized" ACH transactions under NACHA Rules. *See NACHA 2005 Operating Guidelines* at p. 84. Rather, they are a matter of dispute between the customer and the telemarketer/originator and are, in that respect, no different than a consumer complaint regarding goods purchased with a check from a retailer.

- E. First PREMIER complied with appropriate federal law by preparing and filing Suspicious Activity Reports identifying the questionable conduct by the originators to federal law enforcement agencies charged with the duty of investigating and prosecuting crimes. First PREMIER further assisted with the prosecutions of the various telemarketers by providing evidence and information as requested by law enforcement authorities, including the Federal Trade Commission, the Illinois Attorney General, and the United States Department of Justice.

- 9. By entering into this Assurance, First PREMIER does not admit or acknowledge fault, liability or a violation of law in any way or for any purpose.

10. First PREMIER has read and understands this Assurance and enters into it voluntarily. First PREMIER has been advised by its legal counsel of the meaning and effect of each provision of this Assurance.

11. First PREMIER understands that a violation of this Assurance may result in sanctions for contempt and/or that the Attorneys General may, individually or collectively, thereafter initiate legal proceedings against it for any and all violations of state law.

12. The Attorneys General, without further notice, may apply ex parte to an appropriate court in their respective states for an Order approving this Assurance. Service of the application may be made upon First PREMIER by mailing a copy of the application to Keith A. Gauer, Esq., Davenport, Evans, Hurwitz & Smith, P.O. Box 1030, Sioux Falls, SD 57101-1030, attorneys for First PREMIER.

DEFINITIONS

13. For purposes of this Assurance the following definitions apply:

A. **ACH** means automated clearing house.

B. **ACH Debit** means any completed or attempted debit to a consumer's account at a financial institution that is processed electronically through the ACH Network.

C. **ACH Network** means the electronic funds transfer system governed by the rules developed by NACHA that provide for the interbank clearing of credit and debit entries to accounts at financial institutions.

- D. **Consumer Bank Account** means any checking or savings account held directly or indirectly by any individual(s) in any financial institution such as but not limited to a bank, savings and loan, or credit union.
- E. **Consumer Protection Statutes** means Minn. Stat. §§ 325F.69, subd. 1 and 325D.44, subd. 1 (2004); Iowa Code § 714.16 (2003); and SDCL ch. 37-24.
- F. **Existing Relationship** means a relationship in which there exists a written agreement between the Originator and a consumer for the provision of goods or services or in which the consumer has purchased goods or services from that Originator within the past two years.
- G. **Express Verifiable Authorization** means 1) express written authorization by a customer, including the customer's signature and date of authorization; or 2) express oral authorization that is audio-recorded and clearly evidences the customer's authorization of payment for the goods or services that are the subject of the transaction; the number of debits, charges, or payments; the date the debits, charges, or payments shall be submitted for payment; the amount of the debits, charges, or payments; the customer's name; the customer's billing information, including the account used to collect payment; the telephone number for customer inquiry that is answered during normal business hours; and the date of the customer's oral authorization.
- H. **Fraudulent, Deceptive or Unfair Practices** means acts or practices that violate Consumer Protection Statutes.
- I. **NACHA** means the National Automated Clearing House Association.

- J. **NACHA Rules** means the NACHA Operating Rules, including any future amendments.
- K. **ODFI** means an originating depository financial institution, a financial entity that participates in the ACH Network by initiating ACH entries pursuant to assurances with other ACH Network participants.
- L. **Originator** means any individual, corporation, or other entity that purportedly has direct contact with consumers and purportedly receives permission from the consumer to electronically debit his or her Consumer Bank Account.
- M. **Process from any Consumer Bank Account** means submission by First PREMIER acting as an ODFI of an ACH Debit into the ACH Network.
- N. **Return** means any ACH entry that has been returned to the ODFI by the RDFI or by the ACH Operator.
- O. **RDFI** means a Receiving Depository Financial Institution, a financial entity that participates in the ACH Network by receiving ACH entries debiting one or more of the entity's Consumer Bank Accounts.
- P. **Sale of Credit-Related Goods or Services** means requesting or receiving payment of any fee or consideration in advance of obtaining a loan or other extension of credit when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit for a person. The definition shall not include the operations of First PREMIER or its affiliate, Premier Bankcard, Inc.

- Q. **TEL Debit** means an ACH Debit for an item in which authorization to debit the Consumer Bank Account is received during a telephone conversation.
- R. **TEL Rule** means the NACHA rule governing the submission of TEL Debit transactions for processing in the ACH Network, including any future amendments.
- S. **Telemarketer** means any Originator that generates ACH TEL Debits through Telemarketing.
- T. **Telemarketing** means any plan, program, campaign, or other business activity which is conducted to induce consumers to agree to purchase and pay for goods or services by means of a telephone sales presentation, either exclusively or in conjunction with the use of other sales or marketing techniques. The term does not include the solicitation of sales through the mailing of a catalog which –
1. contains a written description or illustration of the goods or services offered for sale,
 2. includes the business address of the seller,
 3. includes multiple pages of written material or illustrations, and
 4. has been issued not less frequently than once a year, where the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation.

- U. **Third-Party Service Provider** means an entity other than an Originator, ODFI or RDFI that performs any function on behalf of the Originator, ODFI, or RDFI related to processing of ACH Debits, including but not limited to creating ACH files or acting as a sending or receiving point for transactions in the ACH Network.

CONDUCT PROHIBITIONS

14. **Fraudulent, Deceptive or Unfair Practices.** First PREMIER shall not Process from any Consumer Bank Account ACH Debits that it knows, or reasonably should know, at the time the transaction is processed by First PREMIER, are derived from conduct that constitutes Fraudulent, Deceptive or Unfair Practices.

15. **Violation of TEL Rule.** First PREMIER shall not Process from any Consumer Bank Account ACH Debits that it knows, or reasonably should know, at the time the transaction is processed by First PREMIER, violate the TEL Rule or would violate the TEL Rule but for a mischaracterization of the source or nature of such debits, including but not limited to ACH Debits initiated with an incorrect standard entry class code or as recurring ACH Debits, rather than one-time ACH Debits.

16. **Sale of Credit-Related Goods and Services.** First PREMIER shall not, acting as an ODFI, Process from any Consumer Bank Account ACH Debits that First PREMIER knows, or reasonably should know, at the time the transaction is processed, derive from the Sale of Credit-Related Goods and Services.

17. **Failure to Obtain Express Verifiable Authorization or Send Confirmation Notice.** First PREMIER shall not Process from any Consumer Bank Account TEL Debits where

First PREMIER knows, or reasonably should know, at the time the transaction is processed by First PREMIER, that the Originator failed to either obtain the consumer's Express Verifiable Authorization, or to provide the consumer with written notice confirming the consumer's oral authorization prior to the settlement date of the entry.

18. **Failure to Require and Enforce Compliance with NACHA Rules.** First PREMIER shall not Process from any Consumer Bank Account TEL Debits where its contract for such Processing with the Originator or Third-Party Service Provider, as applicable, fails to specifically incorporate and require compliance, subject to termination of the contract, with all applicable provisions of the NACHA Rules and any future amendments thereto.

19. **Termination of TEL Debit Origination based upon Monitoring.** First PREMIER shall cease processing TEL Debits from any Consumer Bank Account by any Originator that First PREMIER finds, as a result of its Monitoring program described herein, to be in violation of the requirements set forth in paragraphs 14, 15, 16, 17 or 18. First PREMIER shall cease processing the TEL Debits as soon as commercially practicable, but in no event later than seven (7) days, after discovery of the violation.

PRE-SCREENING PROCESS

20. Prior to contracting with any Telemarketer to provide ACH processing services, First PREMIER shall pre-screen each such Telemarketer, under any corporate or assumed name(s) under which the Telemarketer operates, as follows ("Pre-Screening Process"):

- A. First PREMIER shall determine the general type or category of business engaged in by the Telemarketer (for example, marketing vacation packages,

club memberships, medical supplies, etc.) and how long the Telemarketer has been in business.

- B. First PREMIER shall obtain evidence of the business organization of the Telemarketer, including but not limited to a copy of the Telemarketer's organizational documents such as articles of incorporation, articles of organization, partnership agreement, or similar documents.
- C. First PREMIER shall determine whether each Telemarketer is listed in telephone and internet directories, and in one or more other standard business reference sources or directories such as Dun & Bradstreet, Lexis/Nexis, Sheshunoff Information Services, and Experian.
- D. First PREMIER shall determine if each Telemarketer is publicly or privately held. If the Telemarketer is publicly held, First PREMIER shall obtain the most recently available SEC filings summarizing the Telemarketer's financial status. If the Telemarketer is privately held or a partnership or sole proprietorship, First PREMIER shall obtain the names and contact information for the principal owner(s) and obtain a credit report with credit information on the principal owners.
- E. First PREMIER shall obtain and review representative samples of the telemarketing script(s), promotional materials, and other marketing materials used or intended to be used by each Telemarketer.
- F. First PREMIER shall determine the manner in which the Telemarketer markets and sells merchandise to consumers. If the Telemarketer engages in

outbound Telemarketing, First PREMIER shall confirm that the Telemarketer's business and marketing plans provide that the Telemarketer will have an Existing Relationship with the consumers contacted by telephone or, where there is not an Existing Relationship between the Telemarketer and the consumer, that the consumer initiates the call.

- G. First PREMIER shall confirm that the Telemarketer does not employ oral authorizations for recurring ACH Debits of any given Consumer Bank Account in violation of the TEL Rule.
- H. First PREMIER shall require the Telemarketer to identify the corporate name, assumed name(s), addresses and telephone numbers of any Third-Party Service Provider or ODFI through which the Telemarketer has processed ACH debits within the preceding three (3) years. First PREMIER shall make reasonable efforts to contact each such entity regarding the Telemarketer's current and past business practices concerning the use of ACH transactions to pay for telemarketed merchandise.
- I. First PREMIER shall obtain complaints and any other information available from the Better Business Bureau ("BBB") regarding the Telemarketer by electronically searching any BBB databases under all known names and telephone numbers used by the Telemarketer.
- J. To the extent such information is reasonably accessible, First PREMIER shall obtain all Reports of Possible ACH Rules Violations, any information

concerning ACH debit Return rates, and any other information available from NACHA regarding the Telemarketer.

- K. To the extent such information is reasonably accessible, First PREMIER shall determine whether the Telemarketer and/or its principal(s) has ever been the subject of an investigation or law enforcement action by the Federal Trade Commission ("FTC") or by the Attorney General's Office of any state or an appropriate law enforcement agency in any country in which the Telemarketer is located ("AGO"), determine the substance of such FTC or AGO investigation or lawsuit, and determine the nature and volume of consumer complaints received by the FTC or AGO concerning the Telemarketer.
- L. First PREMIER shall review the refund policy of the Telemarketer.
- M. First PREMIER shall review the policies and procedures of the Telemarketer concerning handling and/or responding to consumer complaints.
- N. First PREMIER shall confirm that the Telemarketer has an operable and staffed telephone number where consumers can telephonically reach the Telemarketer.

21. In connection with any agreement with a Third-Party Service Provider, First PREMIER shall contractually obligate the Third-Party Service Provider to identify any Telemarketer who will be originating ACH entries through the Third-Party Service Provider. First PREMIER shall utilize the Pre-Screening Process described herein for each Telemarketer identified by the

Third-Party Service Provider prior to Processing from any Consumer Bank Account any TEL Debits originated by such Telemarketer.

22. Prior to contracting with any Telemarketer to provide ACH processing services and prior to consenting to the provision of ACH processing services to any Telemarketer client of a Third-Party Service Provider, First PREMIER shall take the following actions upon completion of the Pre-Screening Process:

- A. If the Telemarketer fails to provide First PREMIER with information required for First PREMIER to complete the Pre-Screening Process, then First PREMIER shall decline to contract with the Telemarketer to provide ACH processing services or (if applicable) require the Third-Party Service Provider to refrain from submitting ACH transactions originated by the Telemarketer.
- B. If the Telemarketer is engaged in the Sale of Credit-Related Goods or Services, then First PREMIER shall decline to contract with the Telemarketer to provide ACH processing services or (if applicable) require the Third-Party Service Provider to refrain from submitting ACH transactions originated by the Telemarketer.
- C. If the information obtained during the Pre-Screening Process reasonably suggests that the Telemarketer is engaging in Fraudulent, Deceptive or Unfair Practices, or is violating the TEL Rule, then First PREMIER shall decline to contract with the Telemarketer to provide ACH processing services or (if

applicable) require the Third-Party Service Provider to refrain from submitting ACH transactions originated by the Telemarketer.

MONITORING

23. First PREMIER shall monitor Returns of each Telemarketer for which it provides ACH processing services ("Monitored Entity") whether directly or through a Third-Party Service Provider as follows ("Monitoring"):

A. If a Monitored Entity's:

- (i) total unauthorized Return rate exceeds the TEL Entry reporting threshold set forth in the NACHA Rules (as currently set at 2.5 % by NACHA Operating Rule 2.11.3 or as later amended) ("Excess Unauthorized Return Rate"),
- (ii) total return rate for any four week period exceeds 8.88 % ("Excess Return Rate"), or
- (iii) gross volume of returns, monitored no less frequently than on a weekly basis, increase significantly based on prior experience ("Gross Return Increases"),

First PREMIER shall promptly commence an investigation of the Excess Return Rate, Excess Unauthorized Return Rate, or the Gross Return Increases, and complete the investigation as soon as commercially practicable but in any event within thirty (30) days, which investigation shall include the following steps:

1. First PREMIER shall review its own records, and those of the Monitored Entity, with regard to the reason for the Excess Return Rate, Excess Unauthorized Return Rate, or the Gross Return Increases, including any records on Returns, any consumer communications (e.g., written or oral complaints seeking a Return), or other relevant information, including but not limited to updated versions of telemarketing scripts and other information obtained in the Pre-Screening Process;
2. First PREMIER shall contact a random sample of the customers who claim that a debit to his or her account is unauthorized in order to determine the basis for such a claim, and to determine whether the debit was originated through outbound Telemarketing;
3. First PREMIER shall obtain complaints and any other information available electronically from the Better Business Bureau ("BBB") regarding the Monitored Entity which First PREMIER did not obtain during the Pre-Screening Process; and
4. First PREMIER shall request, and, to the extent the RDFIs make them available, review any affidavits, written statements under penalty of perjury, other sworn statements, or any other communications from customers of the Monitored Entity to RDFIs that contacted First PREMIER regarding the activities of the Monitored Entity.

B. If First PREMIER determines that Fraudulent, Deceptive or Unfair Practices contributed to the Excess Return Rate, Excess Unauthorized Return Rate, or the Gross Return Increases, First PREMIER shall immediately terminate its provision of ACH processing services to the Monitored Entity.

24. First PREMIER shall monitor the ACH transactions submitted by any Third-Party Service Provider to determine whether any unapproved Telemarketers are submitting ACH entries for processing by the Bank. If First PREMIER determines that unapproved Telemarketers are submitting entries, First PREMIER shall terminate their ability to originate ACH debits until they have satisfactorily completed the Pre-Screening Process.

COMPLIANCE INFORMATION

25. First PREMIER shall cooperate with reasonable requests by the Attorneys General, individually or collectively, for information regarding compliance with this Assurance.

MONETARY PAYMENT

26. Upon execution of this Assurance, First PREMIER shall pay the total sum of \$200,000.00 to the States of Minnesota, Iowa and South Dakota by their Attorneys General under Minnesota Statutes 8.31 (2004); 2004 Iowa Acts, chapter 1175, section 180, subsection 3; and SDCL chapters 37-23 and 37-24, which sum reflects in part the disgorgement of gross revenue received from the telemarketers identified in paragraph 7 above. Such sum shall be paid by certified funds made payable to such accounts and addresses, and in such allocation, as the Attorneys General direct and shall be used by the Attorneys General as reimbursement for their fees, costs, and expenses incurred in connection with reviewing First PREMIER's ACH program or for consumer education, public protection or enforcement, or for any other purpose authorized by state law.

RELEASE

27. In exchange for the above actions, each Attorney General releases First PREMIER from any and all claims and causes of action under the Consumer Protection Statutes that accrue or accrued to the Attorney General concerning conduct alleged in this Assurance relating to ACH processing that precedes the Effective Date of this Assurance.

EFFECTIVE DATE

28. The parties agree that First PREMIER's obligations under this Assurance shall become effective thirty (30) days after the date upon which the Agreement is fully executed.

FIRST PREMIER BANK

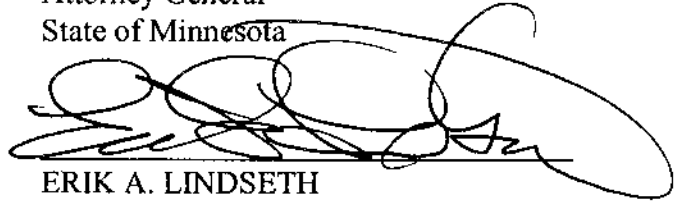
DATED: 6-28-05

By: 
DANA J. DYKHOUSE
President and Chief Executive Officer

Dated:

6/27/05

MIKE HATCH
Attorney General
State of Minnesota

A large, stylized handwritten signature in black ink, likely belonging to Erik A. Lindseth, is written over a horizontal line.

ERIK A. LINDSETH
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ATTORNEYS FOR STATE OF MINNESOTA

Dated: July 6, 2005

TOM MILLER
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A handwritten signature in black ink, appearing to read 'Steve St. Clair', written over a horizontal line.


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ATTORNEYS FOR STATE OF IOWA

Dated: June 29, 2005

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ATTORNEYS FOR STATE OF
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